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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/768,797	01/30/2004	John T. Braun	MSDI-682/PC798.00	7113
52196	7590	04/19/2007		
KRIEG DEVAULT LLP ONE INDIANA SQUARE, SUITE 2800 INDIANAPOLIS, IN 46204-2709			EXAMINER BLANCO, JAVIER G	
			ART UNIT	PAPER NUMBER
			3738	
			MAIL DATE	DELIVERY MODE
			04/19/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/768,797

Applicant(s)

BRAUN ET AL.

Examiner

Javier G. Blanco

Art Unit

3738

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 02 April 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: 81-101.  
Claim(s) objected to: 21.  
Claim(s) rejected: 1-5, 8, 9, 13-15, 18-20, 27-29, 31, 32, 34-38 and 45-48.  
Claim(s) withdrawn from consideration: 6, 7, 10-12, 16, 17, 22-26, 30, 33, 39, 41-44, 49 and 50.


**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

  
**CORRINE McDERMOTT**  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700

  
Javier G. Blanco  
April 10, 2007

Continuation of 11. does NOT place the application in condition for allowance because:

1. With regards to the 102 rejection based on Elberg et al. (US 6,440,169 B1), the Applicant argues that Elberg et al. do not disclose the subject matter of claims 1-3, 5, 8, 9, 13, 14, 18-20, 27-29, 32, 34-37, and 45-47. The Examiner respectfully disagrees. As previously indicated, Elberg et al. disclose an implant comprising elastically deformable (see column 5, lines 28-35) body 6 made of a titanium alloy; a first anchor 2 comprising holes/apertures (U-shaped hole/aperture AND/OR holes 27) and teeth 25; a second anchor 2 comprising holes/apertures (U-shaped hole/aperture AND/OR holes 27) and teeth 25; a longitudinal axis (axis 5); a medial axis orthogonally oriented to said longitudinal axis (clearly shown in Figures 1-3) which medial axis includes an enlarged mid-portion; wherein said body includes a length extending between opposite first and second ends when said body is in a first condition, said body including a second condition wherein said body is longitudinally compressed between said opposite ends with said compressed length sized for implanting (emphasis will be added to functional language) said body, said body including means for reforming (e.g., elastically deformable material) from said second condition toward said length of said first condition when implanted and released from said compression. Once implanted, said body will either compress or extend/elongate, depending on the flexion and extension movements of the two opposite vertebrae, wherein the implant is configured and capable of reforming to an initial/original condition while exerting/maintaining distraction of said opposite vertebrae. As clearly shown in Figure 1, sides of the medial axis are triangular in shape. As disclosed in column 2, lines 25-33; column 4, lines 3-10; column 5, lines 2-10; the body includes a stiffness and thickness which varies along the length of the body, including a thickness that tapers from a medial portion of said body toward opposite ends of said body (see Figure 1).
2. With regards to the 102 rejection based on Perren et al. (US 6,019,793 A), the Applicant argues that Perren et al. do not disclose the subject matter of claims 1-5, 8, 9, 13-15, 18, 27-29, 31, 37, 38, and 45-48. The Examiner respectfully disagrees. As previously indicated, Perren et al. disclose an implant comprising a body made of a shape memory material; a first anchor (upper pyramidal teeth 8) capable of engaging to a first vertebra; a second anchor (lower pyramidal teeth 8) capable of engaging to a second vertebra; wherein the body has a length along a longitudinal axis (i.e., longitudinal axis of the spine column) extending between opposite first (upper plate 1) and second (second plate 1) ends; a medial axis orthogonally oriented to said longitudinal axis, which medial axis includes an enlarged mid-portion. As shown in Figures 4 and 5 (and disclosed at column 3, line 19 to column 4, line 2), the body is deformed/pressed/compressed from an initial state/condition (shown in Figures 1-3 and 5) to a second state/condition (shown in Figure 4) when implanted, and will reform/restore to said initial state/condition in order to exert/maintain distraction force between the first and second vertebrae. The body further includes holes in the first and second ends (see holes 5). The stiffness of the body varies along the length of the body, which is demonstrated by the thin portions and thicker portions, with an increased stiffness toward the median of the body.
3. With regards to the 102 rejection based on Justis et al. (US 6,293,949 B1; cited in Applicants' IDS), the Applicant argues that Justis et al. do not disclose the subject matter of claims 1-5, 8, 9, 13, 14, 18-20, 27-29, 34-38, and 45-48. The Examiner respectfully disagrees. As previously indicated, Justis et al. disclose an implant (system 20) comprising a body (member 22) made of a shape memory material; a first anchor 32 having bores 58, 66; a second anchor 32 having bores 58, 66; a longitudinal axis (axis L); a medial axis orthogonally oriented to said longitudinal axis, which medial axis includes an enlarged mid-portion; wherein said body includes a length extending between opposite first and second ends when said body is in a first condition, said body including a second condition wherein said body is longitudinally compressed (e.g., "prestressed"; see column 6, lines 65-67; column 11, lines 33-40) between said opposite ends with said compressed length sized for implanting (emphasis will be added to functional language) said body, said body including means for reforming (e.g., shape memory material) from said second condition toward said length of said first condition when implanted and released from said compression. Once implanted, said body will either compress or extend/elongate, depending on the flexion and extension movements of the two opposite vertebrae, wherein the implant is configured and capable of reforming to an initial/original condition while exerting/maintaining distraction of said opposite vertebrae (see column 12, lines 5-45 and lines 60-67). As clearly shown in Figures 3, 4a, and 4b, sides of the medial axis are triangular in shape (see column 7, lines 10-19). There are regions tapering in width from the medial axis toward each of the first and second ends of the body. The stiffness of the body varies along the length of the body, which is demonstrated by the presence of thin portions and thicker portions..